

FAIR POLITICAL PRACTICES COMMISSION
Memorandum

To: Chairman Randolph and Commissioners Blair, Downey, Huguenin and Remy

From: Emelyn Rodriguez, Counsel, Legal Division
John W. Wallace, Assistant General Counsel
Luisa Menchaca, General Counsel

Subject: Adoption of Amendments to Regulations 18421.1 and 18216 – Reporting of
Recurring Electronic Contributions

Date: September 14, 2006

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I. EXECUTIVE SUMMARY

This memorandum addresses proposed amendments to regulation 18421.1 and 18216 under the Political Reform Act (the “Act”),¹ relating to the reporting of recurring or installment electronic contributions.²

Amendments to regulation 18421.1 and 18216 are proposed to specify how to report contributions paid electronically for a specified period of time, or an on-going basis. The amendments are also intended to clarify that installment payments made electronically are not enforceable promises to make a payment.

Due to the limited scope and non-controversial nature of this project, there was no prenotice discussion held. Staff has noticed the proposed regulation through the Office of Administrative Law, and recommends adoption of the proposed amendments. We have received no public comments.

Regulation 18421.1 deals with the disclosure of the making and receipt of contributions. Subdivision (e) of the regulation deals specifically with electronic contributions, and defines *when* an electronic payment is *received* for purposes of the Act. The current language of regulation 18421.1(e) applies to reporting of a *single* electronic contribution, and not to a series of contributions made on an installment basis. Amendments to this regulation would clarify *when* each installment payment is “received” for purposes of the Act.

¹ Government Code sections 81000 – 91014. Commission regulations appear at title 2, sections 18109-18997, of the California Code of Regulations.

² Installment contributions consist of a series of payments made at regular intervals over a period of time. For instance, an “installment contribution” of \$90, could be paid in \$30 monthly installments, over a three-month period of time. Payments made electronically are those made via credit card, debit card, wire transfer or similar electronic means.

Enforceable promises to make a payment are contributions under the Act. Regulation 18216 defines the term “enforceable promise to make a payment.” Amendments to this regulation would clarify that electronic installment payments are not contributions until the candidate or committee obtains possession or control of the funds.

II. STATUTES AND REGULATIONS

The Act places certain requirements for disclosure and recordkeeping with respect to contributions. Candidates and committees are permitted to receive contributions via the Internet and other electronic means, so long as the Act’s disclosure and recordkeeping requirements are met. (Section 84300; *McAndrews* Advice Letter, No. A-03-197; *Bergeron* Advice Letter, No. I-00-089.)

Definition of Contribution: A contribution is defined in section 82015 as “a payment, a forgiveness of a loan, a payment of a loan by a third party, or *an enforceable promise to make a payment* except to the extent that full and adequate consideration is received, unless it is clear from the surrounding circumstances that it is not made for political purposes.” (Emphasis added.) A contribution is further defined in regulation 18215 as “any payment made for political purposes for which full and adequate consideration is not made to the donor.”

Enforceable Promise to Pay: Regulation 18216 defines what constitutes “an enforceable promise to make a payment.” Subdivision (a) of this regulation states that “[a] person who makes an enforceable promise to make a payment to or at the behest of a candidate or committee makes a contribution to the candidate or committee, except to the extent the person receives full and adequate consideration, and unless it is clear from the surrounding circumstances that the enforceable promise is not made for political purposes.”

Subdivision (b) of regulation 18216 states that a person makes “an enforceable promise to make a payment” when he or she: (1) guarantees a loan; (2) furnishes security for a loan; (3) endorses a loan; (4) cosigns a loan; (5) makes and delivers a post-dated check; (6) establishes a line of credit at a bank or other commercial lending institution for a candidate or committee; (7) promises in writing to make a payment for specific goods or services, and the candidate or committee, based on the promise, expends specific funds or enters into an enforceable contract with a third party.

Subdivision (c) of regulation 18216 states that a person does *not* make an enforceable promise to make a payment “if he or she signs a pledge card or similar document, or otherwise agrees, orally or in writing, to make a future payment....”

When a Contribution is Made or Received: Regulation 18421.1 states the rules for determining when a contribution is “made” or “received” for purposes of the campaign disclosure provisions of the Act. Subsection (e) deals specifically with electronic contributions. It states that “a monetary contribution made through wire transfer, credit card transaction, debit account transaction or similar electronic payment option

(including those made via the Internet) is ‘received’ on the date the candidate or committee, or the agent of the candidate or committee, obtains possession or has control of the debit/credit account information or other payment information by which the contribution is made, or on the date the candidate or committee, or the agent of the candidate or committee, obtains possession or has control of the funds, whichever is earlier.”

III. BACKGROUND

Technological advancements in recent years have provided candidates and committees with numerous options to receive contributions via electronic transactions through credit card, debit account and other similar means. The regulated community has sought advice on how to report contributions received through these various methods.

In general, staff has advised that electronic contributions are allowable under the Act, while emphasizing the importance of timely and accurate disclosure of all contributions. Staff advice has also emphasized the importance of maintaining detailed records and source documentation needed to accurately prepare campaign statements and comply with the recordkeeping provisions of the Act. Much of the guidance provided by the Commission has been through advice letters and campaign manuals.³

In recent years, the Commission has also amended its regulations⁴ to accommodate new technologies, and the various ways that campaigns are utilizing them.

In 2004, the Commission adopted amendments to regulations 18401 and 18421.1 that established recordkeeping and disclosure standards for electronic contributions. Regulation 18401, the required recordkeeping regulation, was amended to outline which records are required to be retained for a contribution made through electronic means. Regulation 18421.1, which contains the standards for determining when a contribution is made or received, was amended to specify the rule for determining when an electronic contribution has been “made” or “received.”⁵

³ Staff has provided advice regarding electronic contributions since 1978, when the *Schwartz* Advice Letter, No. A-78-193, stated that the Act did not prohibit fund-raising through credit card contributions provided over the telephone, so long as the operation was run in compliance with the rules of the Act. In 2000, staff advised that contributions via the Internet were permissible so long as the Act’s disclosure and recordkeeping requirements were met. (*Bergeron* Advice Letter, *supra*.) In 2003, staff advised in the *McAndrews* Advice Letter, *supra*, that an electronic contribution is “received” on the date the transaction is authorized by the contributor, and not the date the committee actually receives the monetary contribution. However, 2004 amendments to regulation 18421.1 have superseded the advice in *McAndrews*. Under regulation 18421.1(e), electronic contributions are “received” when the candidate or committee obtains possession or control of the donor’s debit or credit account information or obtains possession or control of the funds, whichever is earlier.

⁴ The most recent amendments were passed in 2004 involving regulation 18401 and 18421.1, addressing recordkeeping and disclosure of making and receipt of contributions.

⁵ Legal Division memorandum by Galena West, dated May 28, 2004, regarding “Pre-notice Discussion of Amendments to Required Recordkeeping for Chapter 4 – Regulation 18401 and Disclosure of the Making and Receipt of Contributions—Regulation 18421.1.”

However, some ambiguities currently exist in the Commission's regulations for reporting of recurring or installment electronic payments. The proposed amendments, which are later discussed in this memorandum, attempt to remedy this issue.

This regulatory project was proposed last year by the Commission's Technical Assistance Division, after the division received an inquiry from a member of the regulated community expressing concern that reporting requirements were unclear for electronic installment contributions under regulation 18421.1.

IV. REGULATORY AMENDMENTS

Proposed Amendments to regulation 18421.1:

Staff has advised that electronic contributions are allowed under the Act and are "received" when the candidate or committee obtains possession or control of the donor's debit or credit account information or obtains possession or control of the funds, whichever is earlier. (Regulation 18421.1(e).)

The rationale for using the two standards – the *possession or control of the funds* and the *possession or control of the payment information*, whichever is earlier—was to avoid manipulation or purposeful delay of reporting dates.⁶ A staff memorandum described a possible scenario: "If, for example, an electronic contribution is only considered 'received' upon receipt of the payment information, those committees with automatic deposit of electronic contributions via the Internet may [be able to] delay their review of payment notifications and arguably suspend reporting. Although already in the committees' accounts and available for spending, committees may interpret the language of the regulation to permit this."⁷

However, a strict application of regulation 18421.1 to electronic installment contributions would require a candidate or committee to report upon receipt of either the first installment payment, or the donor's account information, the full amount of the promised contribution. This could lead to inaccurate reporting dates and amounts.

For instance, a contributor makes an Internet contribution of \$90 to a candidate on his credit card to be paid in three monthly installments of \$30. Under the current requirements of regulation 18421.1, the candidate must report the full amount of \$90 at the time the pledge is received, because the candidate has possession and control of the credit card information, even though the candidate has only received \$30, and the additional payments will be apportioned over several months.

⁶ "Pre-notice Discussion of Amendments to Required Recordkeeping for Chapter 4 – Regulation 18401 and Disclosure of the Making and Receipt of Contributions – Regulations 18421.1," *supra*.

⁷ "Pre-notice Discussion of Amendments to Required Recordkeeping for Chapter 4 – Regulation 18401 and Disclosure of the Making and Receipt of Contributions – Regulations 18421.1," *supra*.

It could also necessitate the amendment of campaign statements and reports, should the candidate or committee fail to receive the full amount of the promised contribution.

Thus, the current language of regulation 18421.1(e) would logically apply to reporting of a *single* electronic contribution, and not to a series of contributions made on an installment basis.

The proposed amendments to regulation 18421.1 attempt to clarify that in the case of installment payments, the contribution is reported as received when the candidate or committee, (or agent of the candidate or committee) obtains possession or control of the funds for each installment payment.⁸ Thus, in effect, each installment payment is treated like a separate transaction, with the date and amount of each scheduled payment reported separately. The proposed amendments would also specify that the amount reported as received is the amount of each installment payment.

The amendments to regulation 18421.1(e) would state that:

“(e) Notwithstanding subdivision (c) above, a monetary contribution made through wire transfer, credit card transaction, debit account transaction or similar electronic payment option (including those made via the Internet) is ‘received’ on the date the candidate or committee, or the agent of the candidate or committee, obtains possession or has control of the debit/credit account information or other payment information by which the contribution is made, or on the date the candidate or committee, or the agent of the candidate or committee, obtains possession or has control of the funds, whichever is earlier. In the case of installment payments, the contribution is received when the candidate or committee, or agent of the candidate or committee, obtains possession or control of the funds for each installment payment. The contribution reported is the amount of each installment payment.”

Proposed Amendments to regulation 18216:

Amendments to regulation 18216 clarify that installment payments made electronically are *not* enforceable promises to make a payment. This language is added because an installment payment, which is similar to a pledge to make a future payment, does not meet the statutory definition of a contribution under section 82015. This is due to the fact that a promise or pledge to make a future payment does not normally involve consideration (or an exchange of something of value for the promise) and thus is not a

⁸ This reporting requirement is also consistent with the Federal Election Commission’s practices with regard to contributions received electronically via installment payments. The FEC has advised that pre-authorized contributions that are then periodically collected (installment electronic contributions) are “received” when the contributor’s credit card is charged or the account is debited. (With regard to single electronic contributions made via the Internet, the FEC has advised that these contributions are “received” on the date the committee *receives notice* that the contributor has confirmed the transaction.)

legally binding agreement, unless there is detrimental reliance on the promise.⁹ Thus, future (pre-authorized) installments cannot be reported as contributions until the candidate or committee (or an agent of the candidate or committee) obtains possession or control of the funds.

The proposed amendments to 18216(c) would state that:

“(c) A person does not make an ‘enforceable promise to make a payment,’ as that term is used in subsection (a), if he or she signs a pledge card or similar document, agrees to make a contribution by installment payments through wire transfer, credit card transaction, debit account transaction or similar electronic payment or otherwise agrees, orally or in writing, to make a future payment except as provided in subsection (b).”

V. STAFF RECOMMENDATION

Staff recommends that the Commission approve for adoption the proposed amendments to regulations 18421.1 and 18216.

Attachment:

Proposed amendments to regulations 18421.1 and 18216

⁹ Under certain circumstances, detrimental reliance on a promise to make a future payment is considered an enforceable promise under the Act. Regulation 18216(b)(7) states that a person makes an enforceable promise to make a payment if he or she “[p]romises in writing to make a payment for specific goods or services, and the candidate or committee, based on the promise, expends specific funds or enters into an enforceable contract with a third party.”